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Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

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In the Matter of)
)
Implementation of the Satellite Home)
Viewer Improvement Act of 1999)
)
Broadcast Signal Carriage Issues)

CS Docket No. 00-96

REPLY COMMENTS OF DIRECTV, INC.

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REPLY COMMENTS OF DIRECTV, INC.

DIRECTV, Inc. ("DIRECTV") hereby submits the following reply comments in the above-captioned proceeding.

I. INTRODUCTION & SUMMARY

The compulsory carriage provisions contained in the Satellite Home Viewer Improvement Act of 1999 ("SHVIA")¹ pose extraordinary challenges for the Commission. On the one hand, the legislation seeks to foster competition in the multichannel video programming distribution ("MVPD") market. To do so, it explicitly permits satellite carriers for the first time to offer consumers local broadcast channels in their local markets by removing a statutory limitation that previously prevented direct broadcast satellite ("DBS") operators from offering consumers a fully competitive alternative to cable. On the other hand, the legislation ties this benefit to an onerous compulsory carriage requirement that will prevent satellite carriers from providing local broadcast channel services in many markets, and inevitably will reduce the diverse array of programming such carriers currently offer their subscribers.

¹ Pub. L. No. 106-113, 113 Stat. 1501 (1999).

As DIRECTV noted in its initial comments, the compulsory carriage requirements of Section 338 are constitutionally flawed in several respects.² While the constitutional issues raised by the statute itself are beyond the Commission's ability to address or alter, the fact that the SHVIA's broad carriage requirement raises serious constitutional questions should counsel against any administrative expansion of Section 338's burdens. It is well-established that the normal *Chevron* deference is inapplicable where agency action sails into constitutionally perilous (or even uncharted) waters.³ Thus, the Commission should be wary of the self-serving proposals made by certain commenters that *additional* burdens should be administratively engrafted upon the SHVIA carriage requirement.

The Commission must recognize that the *primary* statutory goal of the SHVIA was to place satellite carriers on a more "equal footing" with cable operators, and thereby facilitate real and sustained competition in the market for delivery of video programming. This has long been a goal of both Congress and the Commission, and it is consistent with Congress' view that in the end, it is competition – *not regulation* – that will bring the freedom of choice and innovation that will best serve consumers. The SHVIA's forced-carriage requirement is in tension with that goal. Because it imposes extremely onerous (and unlimited) carriage requirements on a national platform of limited capacity, the forced-carriage requirement has the potential to frustrate the

² DIRECTV Comments at 3.

³ *NLRB v. Catholic Bishop of Chicago*, 440 U.S. 490, 507 (1979) (requiring the "affirmative intention of Congress clearly expressed" to authorize constitutionally suspect agency action) (quotation omitted). *See also Debartolo Corp. v. Florida Gulf Coast Building & Construction Trades Council*, 485 U.S. 568, 575 (1988) (normal deference to agency action must give way where serious constitutional questions are presented); *Williams v. Babbit*, 115 F.3d 657, 662 (9th Cir. 1997) ("[J]ust as we will not infer from an ambiguous statute that Congress meant to encroach on constitutional boundaries, we will not presume from ambiguous language that Congress intended to authorize an agency to do so.").

primary purpose of the Act. Thus, from a statutory perspective, the Commission should take care that the tail not wag the dog.⁴ Proposals such as “dual must carry” (carriage of both analog and digital signals) could end up limiting the benefits of the SHVIA to the top 10 or 15 markets.

The Commission should also resist suggestions to import cable regulations into the satellite context without regard to the differences between satellite and cable delivery systems and technologies. Numerous sections of the SHVIA evince a congressional recognition that these differences must be accommodated in the Commission’s rules. Moreover, regulations that are reasonable in the context of a regional, earth-bound platform, are completely unreasonable in the context of a national platform utilizing satellite assets that are impossible to alter once designed and deployed. Any proposals to apply existing cable regulations to satellite carriers must be derived from the text of the SHVIA, rather than from an amorphous concept of “regulatory parity.” Those cable must carry rules that are supported by the requirements of the SHVIA must be adapted to the practical circumstances of satellite carriers and the unique technologies, such as compression and spot beaming, that will be used to maximize limited spectrum resources.

The Commission also must ensure that the broadcasters satisfy the statutory prerequisites for carriage. These prerequisites, which include the requirement to request carriage and the obligation to deliver a good quality signal to the satellite carriers’ local receive facility, are modest when compared with the enormous benefit of satellite carriage and the cumulative

⁴ See *Weinberger v. Hynson, Westcott & Dunning, Inc.*, 412 U.S. 609, 631-32 (1973) (“It is well established that [a court’s] task in interpreting separate provisions of a single Act is to give the Act the most harmonious, comprehensive meaning possible in light of the legislative policy and purpose.”) (internal quotations omitted). Accord *United Sav. Ass’n v. Timbers of Inwood Forest Assocs.*, 484 U.S. 365, 371 (1988) (individual provisions of a statutory scheme must be read to “produce[] a substantive effect that is compatible with the rest of the law”).

severity of the obligation imposed on satellite carriers. While it is natural for the broadcasters to seek to minimize their own obligations under Section 338, these burdens were allocated to them by Congress in the express text of the SHVIA. The Commission should not undermine this allocation of burdens.

Finally, consistent with the intent of Congress, the Commission also must encourage satellite carriers to deploy local broadcast channel services in as many markets as possible without diminishing the diversity of non-broadcast programming options they provide to subscribers. The Commission may accomplish this by rejecting broadcasters' arguments to expand the compulsory carriage requirement beyond the mandate contained in Section 338. For example, as DIRECTV suggested in its initial comments, the Commission should limit a broadcasters' right to carriage to its predicted Grade B service contour, and should refrain from requiring satellite carriers to carry stations that provide duplicative programming.

II. CARRIAGE OBLIGATIONS AND DEFINITIONS

Several commenters in this proceeding urge the Commission to import cable carriage obligations and definitions unthinkingly into the satellite context with no alteration or adaptation. These commenters fail to acknowledge that there are important technical differences between cable and satellite delivery systems that warrant different regulatory treatment. They also fail to recognize significant statutory differences between the must carry provisions of the Cable Act of 1992 and those contained in the SHVIA. These differences require the Commission to devise an alternative framework for satellite compulsory carriage. *DIRECTV* therefore urges the Commission to carefully consider the implementation of compulsory carriage in the satellite context, and adapt its rules from the cable context only to the extent that it achieves Congress' intent as expressed in the SHVIA and its accompanying legislative history.

A. The Broadcasters Bear The Initial Burden Of Requesting Carriage Pursuant To Section 338(a)(1).

In unambiguous terms, the SHVIA places an affirmative burden on television broadcast stations to “request” carriage on a satellite carrier’s system.⁵ Despite this fact, the broadcasters urge the Commission to shift this burden to the satellite carriers. Not only do the broadcasters argue that satellite carriers should notify all eligible television stations of their right to carriage, they ask the Commission to impose expansive rules governing the contents of such notice. Some broadcasters provide detailed lists of information the Commission should require satellite carriers to supply before the broadcasters even notify the satellite carriers whether they intend to elect must carry.⁶ Indeed, notwithstanding the language of the statute, the broadcasters’ proposals would require substantially more effort by the satellite carrier than the broadcaster. Under ALTV’s proposal, for example, the broadcaster would play an entirely passive role, essentially activating its must carry rights by “checking the box.”⁷ This proposal is flatly inconsistent with the allocation of burdens set forth expressly in Section 338(a)(1).

As DIRECTV and other parties indicated in their initial comments, the statute imposes a notification requirement on broadcasters, not on satellite carriers.⁸ The Commission should simply require satellite carriers to register the address to which all carriage requests should be

⁵ 47 U.S.C. § 338(a)(1).

⁶ Joint Comments of the Association of America’s Public Television Stations, The Public Broadcasting Service, and The Corporation for Public Broadcasting at 11 (“Public Television Comments”); Comments of the Association of Local Television Stations, Inc. at 40-42 (“ALTV Comments”).

⁷ ALTV Comments at 40-42.

⁸ Comments of DIRECTV, Inc. at 9 (“DIRECTV Comments”); Comments of EchoStar Satellite Corporation at 12 (“EchoStar Comments”).

sent.⁹ This information could be posted on the Commission's website, or made available on each satellite carrier's website. To the extent that the Commission imposes any notification requirements on satellite carriers, such requirements should only apply *after* the television broadcast station has met its initial burden of requesting carriage.

As DIRECTV has argued in the Commission's proceeding concerning the retransmission consent election process, broadcasters should be required to make their initial election between must carry and retransmission consent on July 1, 2001 for the period commencing January 1, 2002.¹⁰ It is imperative that the Commission provide satellite carriers sufficient time to plan and construct receive facilities across the country. If broadcast stations are permitted to make initial elections after July 1, 2001, it will jeopardize DIRECTV's ability to comply with the January 1, 2002 deadline.

The station's written notification should include: (i) the station's call sign; (ii) the name of the appropriate contact person; (iii) the station's address for purposes of receiving official correspondence; and (iv) the station's affirmative must carry election. Once the station has provided such notice to the satellite carrier, the satellite carrier should, within 30 days, provide the station with an acknowledgement of the request for carriage and should indicate the location of its designated local receive facility. The Commission should refrain from imposing any further notification requirements on satellite carriers.

⁹ DIRECTV Comments at 11-12.

¹⁰ DIRECTV Comments, In the Matter of the Satellite Home Viewer Improvement Act of 1999 – Retransmission Consent Issues, Notice of Proposed Rulemaking, CS Docket No. 99-363 (submitted Feb. 1, 2000).

B. Notification Requirements Imposed On Cable Operators By Statute Should Not Be Applied To Satellite Carriers.

The cable industry also asks the Commission to overlook the plain text of Section 338(a)(1) and to apply the same notification rules to satellite carriers that govern cable operators. Specifically, the NCTA argues that the Commission should require satellite carriers (i) to notify broadcast stations and subscribers of changes in channel positions or carriage deletions,¹¹ and (ii) to be subject to the cable rule prohibiting cable operators from deleting broadcast stations during the “sweeps” period.¹²

In addition to the healthy skepticism with which the Commission should assess any comments offered by the NCTA in this proceeding, there is absolutely no statutory basis for adopting such proposals. The rules proffered by NCTA are each statutory requirements that were imposed on cable operators by the Cable Competition and Consumer Protection Act of 1992 (“Cable Act”).¹³ Section 614(b)(9) and Section 615(g)(3) expressly require cable operators to notify broadcast stations of changes in channel positions or deletions. Section 614(b)(9) expressly prohibits cable operators from deleting broadcast stations during the period in which major television ratings services measure audience size. In fact, in its order implementing these provisions, the Commission acknowledged that the requirements were clearly specified in the Cable Act.¹⁴ By contrast, the SHVIA neither contains nor contemplates similar requirements. In

¹¹ Comments of the National Cable Television Association at 4 (“NCTA Comments”).

¹² *Id.* at n. 9.

¹³ Pub. L. No. 102-385, 106 Stat. 1460 (1992).

¹⁴ In the Matter of Implementation of the Cable Television Consumer Protection and Competition Act of 1992 – Broadcast Signal Carriage Issues, Report and Order, 8 FCC Rcd 2965, 2992 (1993) (“Cable Must Carry Report and Order”).

the absence of any statutory basis on which to do so, the Commission should refrain from imposing any such requirements on satellite carriers.

C. Section 338(a)(1) Does Not Permit A Default Must Carry Election.

A few parties suggest that must carry should be the default election for television stations, even if they make no request at all.¹⁵ This argument contradicts the text of Section 338(a)(1), however, which expressly requires that broadcast stations “request” carriage, and the commenters advocating a default election provide no rationale sufficient to override such a clear expression of congressional intent.¹⁶ In fact, the only rationale provided by the commenters is once again an appeal to analogy and blind adherence to the cable model, where the default election is must carry.

The fact that Congress did not specify must carry as a default in the satellite context makes good policy sense. In the cable world, there is a statutory limit on the number of stations that a cable operator must carry. For satellite carriers, however, a default must carry election would constitute an extraordinarily onerous burden because the statute contains no such limits. Furthermore, while the Commission adopted a default must carry election in the cable context, its justification for doing so was to provide broadcasters with an “incentive” to make an

¹⁵ NCTA Comments at 4; Comments of BellSouth Corporation and BellSouth Entertainment, Inc. at 7 (“BellSouth Comments”).

¹⁶ *Ardestani v. INS*, 502 U.S. 129, 135 (1991) (“The ‘strong presumption’ that the plain language of the statute expresses congressional intent is rebutted only in ‘rare and exceptional circumstances.’”) (quoting *Rubin v. United States*, 449 U.S. 424, 430 (1981); see also *Burlington N.R.R. Co. v. Oklahoma Tax Comm’n*, 481 U.S. 454, 461 (1987); *Kelly v. Robinson*, 479 U.S. 36, 43 (1986); *Rubin v. United States*, 449 U.S. 424, 439 (1981) (“When we find the terms of a statute unambiguous, judicial inquiry is complete.”)).

affirmative election.¹⁷ In adopting the default election rule, the Commission reasoned that if a cable operator wanted to carry a station and the station both refused to negotiate a retransmission consent agreement and refused to elect must carry status, there would be no means for the cable operator to carry the station's signal.¹⁸ The SHVIA contains two safeguards that obviate the need for such an incentive. First, Section 338(a)(1) requires broadcasters to affirmatively request carriage. Second, Section 325(b)(3)(C) imposes on broadcasters the obligation to negotiate retransmission consent agreements in good faith.¹⁹ It also requires the Commission to adopt rules to enforce that obligation.²⁰

Accordingly, DIRECTV maintains that a broadcaster must request carriage in order to invoke its must carry rights in the first instance. This sequence flows directly from the text of Section 338(a)(1), which explicitly requires broadcasters to "request" carriage. Broadcasters who fail to make such a request should be deemed to have elected the retransmission consent option.

D. The Commission Must Minimize Satellite Carriers' Obligations To Add New Stations Requesting Carriage.

As DIRECTV explained in its initial comments, satellite carriers must plan for coverage and allocate channels far in advance of providing local television signals in local markets.²¹ In

¹⁷ See Cable Must Carry Report and Order, 8 FCC Rcd 2965, 3002.

¹⁸ *Id.*

¹⁹ 47 U.S.C. § 325(b)(3)(C).

²⁰ See In the Matter of Implementation of the Satellite Home Viewer Improvement Act of 1999 – Retransmission Consent Issues: Good Faith Negotiation and Exclusivity, First Report and Order, CS Docket No. 99-363, FCC 00-99 (rel. Mar. 16, 2000).

²¹ DIRECTV Comments at 25-27.

order to provide local television service in as many markets as possible, DIRECTV designed its spot beam satellite to maximize utilization of channel capacity. This design, which is based on the definition of “local market” provide by Congress in Section 122(j)(2), severely limits the amount of capacity available for the subsequent addition of new stations to the line-up in any given market.²²

There is ample support in the record for the Commission to limit satellite carriers’ obligation to carry new stations. LTVS, for example, notes that unlike cable systems, satellite systems operate under fixed capacity limitations and will not be able to accommodate new broadcast stations.²³ LTVS accordingly argues that the number of new stations carried pursuant to Section 338 be limited during the life cycle of the satellite system.²⁴ DIRECTV strongly agrees with this approach and urges the Commission to adopt such a limitation.

E. The Commission Should Reject Any Proposals To Broaden The Carriage Requirement Contained In Section 338.

The Commission should reject any arguments by broadcasters to increase the burdens imposed on satellite carriers by Section 338. SJL of California, for example, argues that the Commission should require satellite carriers to carry the programming of local television broadcast stations operating in six specific markets.²⁵ SJL argues that the requirement to carry these stations should be triggered upon the effective date of the Commission’s rules in this proceeding, rather than the date upon which the satellite carrier begins using the compulsory

²² *Id.* at 21-23.

²³ Comments of Local TV On Satellite, LLC at 10 (“LTVS Comments”).

²⁴ *Id.*

²⁵ Comments of SJL of California at 1-2.

license for those markets.²⁶ Similarly, ALTV asks the Commission to require satellite carriers to provide progress reports at six-month intervals,²⁷ suggesting further that satellite carriers should be subject to some form of due diligence requirement that obligates them to deploy new facilities in order to comply with the must carry provisions of the SHVIA.

Neither of these requirements is necessary, and more importantly, neither has any basis in the statute. The SHVIA does not require satellite carriers to deploy new facilities in order to comply with Section 338. Nor does it contain any obligation to file progress reports with the Commission. To any extent necessary, the Commission should clarify that this is the case.

III. MARKET DEFINITIONS

In the Satellite Home Viewer Act of 1994,²⁸ Congress gave the Commission express authority to define and to modify markets both for purposes of cable compulsory carriage and for the underlying copyright license.²⁹ While several broadcasters and the cable industry urge the Commission to use the same market definitions and modification mechanisms for satellite carriage as it employs for cable compulsory carriage, the Commission cannot infer the authority to do so from the text of the SHVIA. The rules governing satellite must carry must conform with Section 122(j)(2) and the express limitations on the satellite carrier compulsory license.

As DIRECTV explained in its initial comments, the Commission may not expand the must carry obligation beyond the borders of the compulsory copyright license granted to satellite

²⁶ *Id.* at 2.

²⁷ ALTV Comments at 49.

²⁸ Pub. L. No. 103-369, 108 Stat. 3477 (1994).

²⁹ 17 U.S.C. § 111(f).

carriers pursuant to Section 122(j)(2).³⁰ However, the SHVIA does not prevent the Commission from minimizing the carriage burdens using the modification process or other means. Such measures can ensure that broadcast stations carried pursuant to Section 338 remain accountable to the communities in which they are carried. Accordingly, DIRECTV urges the Commission to permit satellite carriers to remove stations from markets using a modification process and to limit the coverage area of television broadcast stations to their predicted Grade B service contour.

A. The Commission Must Ensure That The Satellite Carriage Obligation Is Consistent With The Statutory Limitations On The Compulsory License.

Several commenters urge the Commission to import into the satellite compulsory carriage regime the same rules governing market modification and market definition that the agency has developed in the cable context. Individual broadcasters urge the Commission to apply previous cable market modification decisions to the satellite markets,³¹ and NCTA argues that there is no “legitimate reason” for cable and satellite customers in the same geographic location to have “a different array of local television station offerings.”³² NCTA’s apparent newly-found concern for satellite customers notwithstanding, the language of the statute not only provides a legitimate rationale for different treatment, but *requires* the Commission to define markets for satellite and cable carriage differently.³³

³⁰ DIRECTV Comments at 20-23.

³¹ See, e.g., Comments of KNTV License, Inc. at 6-8; Comments of Mid-State Television, Inc. at 3-8; Comments of WDBJ Television, Inc. at 2-5;

³² NCTA Comments at 5.

³³ Additional commenters, including at least one broadcaster, recognize that the compulsory license schemes applicable in the cable and satellite contexts are fundamentally different. Comments of Paxson Communications Corporation at 6-7 (“Paxson Comments”); BellSouth Comments at 12-13; LTVS Comments at 12-14.

As explained in greater detail in DIRECTV's initial comments, Section 122(j)(2) of the SHVIA does not permit the Commission to expand the definition of "local market" for purposes of the must carry obligation.³⁴ Instead, it specifically relies on Nielsen as the exclusive mechanism to define and modify market boundaries for purposes of the compulsory copyright license as well as for purposes of defining the carriage obligations of satellite carriers. While Section 122(j)(2) allows the local market definition for the compulsory copyright license to be expanded in accordance with later issues of the Nielsen publication, it does not give the Commission authority to redefine markets in a manner that expands carriage obligations outside the Nielsen process.³⁵

In addition to the statutory barrier to the *ad hoc* expansion of local markets outside the Nielsen process, the record indicates that there are technical limitations on satellite carriers' ability to comply with any expansion. DIRECTV and LTVS each noted that satellite carriers that intend to use spot beam satellites to comply with the carriage obligation cannot make adjustments in DMA coverage once the spot beam satellite is designed.³⁶ For DIRECTV, this process is already well underway, as DIRECTV began to design and manufacture its spot beam satellite in reliance upon the express market definition provided by Congress as soon as the SHVIA was enacted. DIRECTV therefore urges the Commission to refrain from expanding the must carry obligation beyond the market borders as defined in the 1999-2000 Nielsen Report.

³⁴ DIRECTV Comments at 20-23.

³⁵ Joint Explanatory Statement of the Committee of Conference on H.R. 1554, 106th Cong. 93 (1999) ("Conference Report") (explaining that narrow construction is required because of effects on exclusive property rights).

³⁶ DIRECTV Comments at 21-23; LTVS Comments at 13.

DIRECTV also asks the Commission to allow satellite carriers maximum flexibility in providing local channels to those subscribers who are located within the contour of the spot beam. As DIRECTV noted in its initial comments, in some instances, a spot beam may not cover an entire DMA.³⁷ A few DMAs include non-contiguous, distant counties. Also, the spot beams are designed to prevent interference from adjacent spot beams, and may therefore require the exclusion of a bordering area of a covered DMA. In both cases, the Commission should allow satellite carriers maximum flexibility in providing local channels at least to those subscribers who are within the contour of the spot beam. This approach is consistent with the congressional goal of facilitating local channel service to as many consumers as possible.

B. The Commission Should Limit The Scope Of Broadcasters' Rights In The Local Market.

Several parties have acknowledged that the SHVIA places an onerous burden on satellite carriers' spectrum resources. While the Commission cannot nullify the carriage requirements dictated expressly by the statute, the Commission can and should reduce the burdens on satellite carriers by limiting the scope of broadcasters' carriage rights in the local markets. DIRECTV and other commenters in this proceeding have provided three suggestions for doing so:

First, the Commission should adopt measures to prevent abuse of the carriage obligation by broadcasters. While Section 122(j)(2) provides a definition of "local market," it does not specify that a broadcaster's carriage rights extend throughout the DMA in which the broadcaster is located. As DIRECTV explained in its initial comments, this absence of specificity creates an

³⁷ DIRECTV Comments at 21-23 (noting that a spot beam may not cover an entire DMA because of non-contiguous counties included in a DMA or due to measures taken to prevent interference from adjacent spot beams).

enormous potential for abuse of the satellite carriage obligation.³⁸ Without clearer guidance by the Commission, a broadcaster licensed to a small community on the fringe of a large DMA may attempt to assert carriage rights throughout the entire DMA. To resolve this issue, the Commission should adopt a rule expressly allowing satellite carriers, at their discretion, to limit the must carry coverage area to the broadcaster's predicted Grade B service contour within the DMA in which the broadcaster is licensed.

Second, the Commission should restrict the must carry rights of any station that changes its community of license to a community that is included in a market served by one or more satellite carriers. As BellSouth has proposed in its initial comments, the Commission should adopt a rule that any station in this situation waives carriage rights or is deemed to have elected retransmission consent for the balance of the applicable period.³⁹ Such a rule would prevent broadcasters from changing their cities of license solely to obtain satellite carriage rights and the increases in audience and revenue that stem from such rights.

Third, the Commission should allow satellite carriers to initiate market modification proceedings to remove a station from a market. As DIRECTV indicated previously, market modifications that do not expand the must carry obligation are not precluded by the statute and will not violate the terms of the compulsory license.⁴⁰ The process by which satellite carriers petition for removal should resemble the Commission's procedures and evidentiary standards in the context of cable market modifications. By adopting this proposal, the Commission can

³⁸ DIRECTV Comments at 23-24.

³⁹ Comments of BellSouth at 7.

⁴⁰ DIRECTV Comments at 21.

ensure that broadcasters continue to serve the communities in which they have acquired must carry rights, or are replaced by stations that better serve the relevant market.

These proposals, if adopted, can ensure that broadcasters serve the communities in which they are carried and will prevent abuse of the carriage obligation. While the proposals will not alleviate satellite carriers' statutory obligations, they will prevent broadcasters from receiving windfall benefits that were not intended by the SHVIA.

IV. BROADCAST STATION DELIVERY OF A GOOD QUALITY SIGNAL

Congress placed certain obligations on broadcasters that must be satisfied before they may invoke their rights to satellite carriage. Among other things, a broadcaster must notify the satellite carrier that it elects must carry status. A broadcaster must also deliver a good quality signal to the satellite carrier's local receive facilities. These obligations are minimal when compared with the vast benefits broadcasters will derive from carriage on a satellite system. Given the enormous costs the carriage obligation imposes on satellite carriers, the Commission must refrain from altering the broadcasters' comparatively modest obligations.

A. Delivery Of A Good Quality Signal Is A Prerequisite To Carriage.

The broadcasters argue generally that a satellite carrier cannot refuse to carry a local station because the station has failed to deliver a "good quality signal" to the local receive facility. They argue that the SHVIA does not remove stations that do not provide a good quality signal from the definition of stations eligible for compulsory carriage rights.⁴¹ The broadcasters

⁴¹ Joint Comments of the ABC, CBS, FOX and NBC Television Network Affiliate Associations at 11-12 ("Network Affiliate Comments"); ALTV Comments at 28; Comments of the National Association of Broadcasters at 5 ("NAB Comments").

further suggest that satellite carriers must complain to the Commission to enforce the signal quality obligation.⁴² NAB and ALTV argue that a satellite carrier may use the complaint process to insist on payment of the costs associated with the delivery of a good quality signal.⁴³ NAB even argues that, in the case of such a complaint, the burden is on the satellite carrier to prove that a station's signal quality is not up to standard.⁴⁴ Taken to its logical extension, this argument would require the satellite carrier to carry any signal provided by a broadcaster asserting carriage until the Commission ruled that the signal did not meet the quality standard. The satellite carrier's only other choice would be to incur whatever expense is necessary to improve the signal on its own, and hope that the broadcaster has sufficient resources for reimbursement, or to carry a signal that does not meet high quality standards, thereby degrading all other channels carried on the transponder.

The broadcasters severely misconstrue the text and intent of the SHVIA. Section 338(b)(1) states: "A television broadcast station asserting its right to carriage under subsection (a) shall be required to bear the costs associated with delivering a good quality signal to the designated local receive facility of the satellite carrier or to another facility that is acceptable to at least one-half of the stations asserting the right to carriage in the local market."⁴⁵ This provision clearly indicates that the delivery of a good quality signal is a necessary prerequisite to invoking carriage rights in the first instance. The use of the phrase "asserting its right to carriage" implies that the station's signal is not already being carried. While the delivery of a

⁴² Network Affiliate Comments at 12; NAB Comments at 5.

⁴³ ALTV Comments at 28-29; NAB Comments at 6.

⁴⁴ NAB Comments at 9.

⁴⁵ 47 U.S.C. § 338(b)(1).

good quality signal may occur after the point at which the station asserts its rights, it certainly must occur before satellite carriage commences.⁴⁶

Aside from the fact that the broadcasters' arguments have no grounding in the statute or its legislative history, the Commission should not require satellite carriers to carry poor quality signals in the first instance because of the effects poor signals can have on other channels. As DIRECTV explained in its initial comments, the use of compression systems based on the Moving Pictures Experts Group ("MPEG-2") standard requires TV1-quality signals.⁴⁷ Any substandard signals supplied to an MPEG encoder will demand more capacity than other signals and will degrade all other channels. While most broadcasters support the use of compression technologies in order to maximize satellite carriage capacity, in this current argument the broadcasters essentially urge the Commission to require satellite carriers to carry substandard signals and to place the burden on satellite carriers to bring a complaint to remove the stations from carriage. If the Commission adopts this contorted reading of the SHVIA, however, severe degradation is likely to occur on *all* local channels, not just those supplied by must carry stations. The results of such a rule would be disastrous for consumers and for competition in the provision of video programming services.

B. Broadcasters Are Required To Bear All Costs Associated With Delivering A Good Quality Signal To The Local Receive Facility.

As DIRECTV and other commenters observed, Congress placed the burden on television broadcast stations seeking carriage to pay for the delivery of a good quality signal to the local

⁴⁶ DIRECTV Comments at 31-33; LTVS Comments at 16.

⁴⁷ DIRECTV Comments at 31-33.

receive facility or to the alternative facility as agreed upon by at least fifty percent of the stations requesting carriage in the local market.⁴⁸ Despite the statutory prerequisite contained in Section 338(b)(1), ALTV argues that local television stations that already transmit a “good quality signal” off-air at the satellite carrier’s local receive facility should not be required to bear any additional costs of delivering the signal to the satellite carrier.⁴⁹ As DIRECTV has explained, however, off-air signals will not meet the quality standards required for efficient MPEG compression. Also, commenters recognize that the statute does not place limits on the expenses that broadcasters are required to bear.⁵⁰ The Commission should not deviate from the allocation of burdens provided for expressly in the statute.

As DIRECTV noted in its initial comments, the expenses associated with the delivery of a good quality signal encompass both the transmission of the signal using a dedicated TV-1 quality fiber circuit from the broadcast station to the satellite carrier’s local facility and any testing that is necessary to ensure that the signal meets the quality standards.⁵¹ The NAB asks the Commission to require testing of signal quality by independent engineers. DIRECTV agrees that an independent engineer may be consulted to determine signal quality. To maintain

⁴⁸ BellSouth Comments at 15.

⁴⁹ ALTV Comments at 24.

⁵⁰ LTVS notes that new methods of delivering signals do not modify a station’s obligation to bear the costs of delivering a good quality signal, either in the cable context or in the satellite context. LTVS Comments at 18.

⁵¹ DIRECTV Comments at 28.

consistency with the statutory allocation of burdens and with the Commission's cable carriage policies,⁵² broadcasters must be required to bear the cost of such testing.

C. The Commission Should Adopt A Strict Standard For Signal Quality That Does Not Prevent Efficient MPEG Compression.

While several commenters support the importation of cable signal quality standards into the satellite context,⁵³ these parties fail to consider the effects such a low standard will have on systems that utilize compression to maximize spectrum resources. Indeed, the adoption of cable signal quality standards will prevent efficient MPEG compression on DIRECTV's system. This result would severely undermine the intent of Congress as expressed in the legislative history⁵⁴ and in Section 338(g), which states that requirements imposed on satellite carriers should be "comparable" to those imposed on cable operators – not identical.

As DIRECTV has explained, TV1-quality signals will be required for carriage by satellite carriers.⁵⁵ In order to facilitate efficient MPEG compression of all channels, the Commission should compel any station seeking carriage to provide a signal that meets the requirements of GR-338 CORE, TV1 for <20 route miles. This standard is widely recognized and accepted for

⁵² See Cable Must Carry Report and Order, 8 FCC Rcd 2965 at 2991 ("it is the television station's obligation to bear the costs associated with delivering a good quality signal to the system's principal headend. This may include . . . tests that may be needed to determine whether the station's signal complies with the signal strength requirements especially if the cable system's over-the-air reception equipment is already in place and is otherwise operating properly.").

⁵³ ALTV Comments at 25; BellSouth Comments at 19; LTVS Comments at 18; Public Television Comments at 15.

⁵⁴ Conference Report at 102.

⁵⁵ DIRECTV Comments at 31-33.

transmission links applicable to fiber and microwave delivery systems, and its use will ensure the reception of high quality pictures on all channels.

Moreover, the comments indicate that broadcasters are willing and able to use fiber delivery systems to provide high quality signals to satellite carriers' receive facilities. Indeed, many broadcasters urge the Commission to permit delivery of local signals by means other than off-air so that they must not solely rely on the quality of their off-air signals to satisfy the quality standards.⁵⁶ Accordingly, the Commission should instead adopt the TV1-quality standard as proposed by DIRECTV, and allow satellite carriers to make discretionary exceptions to the extent that lower quality broadcast signals do not result in material degradation of other signals carried by the satellite carrier.

D. The Commission Should Reject Proposals To Limit Satellite Carriers' Input In The Establishment Of Local Receive Facilities.

Section 338(b)(1) gives satellite carriers discretion to designate local receive facilities, and broadcasters the ability to affect the process by which alternate facilities may be established to the extent that the broadcasters meet the fifty percent threshold required by the statute. Despite the clear requirements of Section 338(b)(1) and the onerous burdens it places on satellite carriers, the broadcasters argue for an expansive interpretation of the alternate facilities clause. Collectively, they argue that: (1) if the fifty percent threshold is met, the site for the alternate facility can be selected by the broadcasters without any input from the satellite carriers;

⁵⁶ Public Television Comments at 15-16 (noting that stations may have to relay their signal over fiber); CTN Comments at 7 (arguing that the Commission's definition of good quality signal should not be linked to off-air signal strength); *id.* (noting that fiber optics or other terrestrial relay means may be necessary to provide a good quality signal to the satellite carriers' local receive facility).

(2) satellite carriers must locate a facility in each station's "local market"; (3) satellite carriers must prove that stations consented to the designated local receive facilities in order to avoid the alternative siting procedure; and (4) the Commission should provide some form of remedy for stations in the minority of a local receive facility siting decision. These proposals go well beyond the statutory mandate contained in Section 338(b)(1) and would impose undue burdens on satellite carriers. DIRECTV addresses each of these arguments below.

1. Alternative Site Selection.

LTVS argues that a satellite carrier can be required to establish an "alternate facility" *wherever* fifty percent of the broadcasters agree a facility should be sited.⁵⁷ DIRECTV strongly disputes this incorrect interpretation of the SHVIA. The Commission simply cannot allow the broadcasters to select a site for a local receive facility and demand that the satellite carrier construct such facility *without any input* from the satellite carrier. Local receive facilities cannot be constructed overnight, nor will any location that may be convenient for the broadcasters suffice. In its initial comments, DIRECTV listed the minimum criteria necessary for the siting of a local receive facility.⁵⁸

LTVS's argument would allow the must carry stations to "demand" that a satellite carrier set up an alternative facility in an area in which none of the requisite criteria are present. Such a result would place enormous burdens on satellite carriers that were not intended by the SHVIA and would deter satellite carriers from providing local channel services in the markets in which broadcasters make such demands. DIRECTV therefore urges the Commission to reject LTVS's

⁵⁷ LTVS Comments at 15.

⁵⁸ DIRECTV Comments at 25-27.